HAJI SAEMAH vs. HAJI SULAIMAN.

[Orig. Civil Juris. (Horne, J.) January 3, 1941]

Distribution of intestate estate — Muhammadan Law — Widow's share — Custom.

The facts appear sufficiently from the judgment.

Held, that the evidence in the suit did not clearly establish any custom that a widow is entitled to more than her Koranic share in her deceased husband's estate.

Existence of such custom reviewed.

Tengku Ismail for Plaintiff.

E. A. S. Wagner for Defendant.

Horne, J. : — The plaintiff Haji Saemah was first married to Haji Mohamed Din bin Haji Dollah in 1915. From 1915 to 1926 she and her husband resided near Bentong. They then returned to Sumatra from whence they have previously come and there her husband died in 1933. On his death he left surviving him two widows, the plaintiff being one, and his brother, who subsequently married and later divorced the plaintiff. The defendant obtained Letters of Administration to the estate of his deceased brother, which consisted of land in Pahang of some value, and has distributed it according to Muhammadan law. The plaintiff, as widow of her first husband, claims that she is entitled to a half share of lands of her deceased first husband as "*Harta Sapencharian*" under customary law and also to her portion of the widow's share under Muhammadan law. This is alleged to be according to the custom among Malays in Pahang.

The law governing the distribution of the intestate estate of a deceased Malay is the Muhammadan law as varied by local custom.

In opening the case Tengku Ismail stated that he intended to prove that in Pahang there is a custom to the effect that a widow is entitled to a half share in such part of her deceased husband's property as has been created by their joint efforts and also to her Koranic share as widow. No question as to domicile was raised in the suit. The claim is made purely upon custom governing distribution. The spouse of a deceased person may have personal claims against the property of the deceased founded in law as apart from custom; and in this case such claims were made unsuccessfully and call for no written judgment.

Several Kathis and one Penghulu were called by Tengku Ismail to give evidence as to this custom. But only the Penghulu of Bentong was clear in stating it in the terms set out by Tengku Ismail. The Kathi of Bentong says there is no such custom and there is no established practice, but on occasion the *waris* of the husband and the *waris* of the wife come to an agreement and give the wife more than her Koranic share and up to one half. There has, he states, been no legal decision that the wife is entitled to a half by the *adat*, and in his experience distribution is made according to "*Hukum Shara*".

The Kathi of Raub stated that where it is proved that a husband and a wife join their earnings from work or trade and purchase property each is entitled to half on death or divorce; but where land is purchased by the husband and work is done on that land by his wife, that is voluntary and she has no claim other than under Muhammadan law.

The Chief Kathi of Pahang, who has lived always at Pekan, was of opinion that an increased share is sometimes given to a widow by agreement. There is no rule that the estate of a deceased spouse must be divided equally and there is no rule where registered land is concerned; but by the consent of the Koranic sharers the widow's share is sometimes increased.

At the conclusion of the evidence Tengku Ismail was constrained to admit that he could not establish any such custom.

The same custom was also alleged in Originating Summons No. 13 of 1940, an application to compel an administrator to distribute the estate in accordance therewith, and the District Registrar at Bentong was ordered to enquire and report. His certificate came before this Court on the day this suit was concluded. It certified that no custom as alleged had been proved and provided for a distribution according to Muham madan law. This certificate was confirmed.

Attempts have also been made in the administration of small estates in the Court of the Collector to establish this alleged custom and it has been stated at the Bar that there is divergence of view among the Administrative Officers. But from the evidence before me I should think that these attempts are more in the nature of recording an agreement among the Koranic sharers. There is no evidence of anything ancient nor of any tribal system from which such an alleged custom may have originated.

There is a wealth of authority as to how a custom must be established and the effect of those authorities is concisely stated in the 9th edition Law of Evidence (*Woodroffe* and *Ameer Ali*), page 175 :—

> 'Custom' as used in the sense of a rule which in a particular district, class, or family has from long usage obtained the force of law must be ancient, continued, unaltered, uninterrupted, uniform, constant, peaceable and acquiesced in, reasonable, certain and definite, compulsory and not optional to every person to follow or not. The acts required for the establishment of customary law must have been performed with the consciousness that they spring from a legal necessity.....

The evidence in this suit does clearly not establish a custom and the suit is dismissed with costs.

Suit Dismissed.